Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 76 ST. LOUIS, MO., MAY 2, 1913. No. 18

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POLICE POWER UNDER COMMERCE CLAUSE TO PENALIZE IMMORAL PURPOSES.

The Honorable Albert P. Stark, Judge of the Sixth Judicial District Court of Montana, has kindly favored us with a copy of an opinion giving his reasons for sustaining a demurrer, without leave to amend, to an information based upon a state statute providing, "*inter alia*, that anyone who shall aid a woman or girl in obtaining transportation to or within this state for the purpose of prostitution or concubinage or any other immoral purpose, shall be deemed guilty of a felony." State v. Harper, Sixth Judicial District Court Montana.

The information charged defendant with aiding a woman in obtaining transportation from Woodlake, in the State of Minnesota, to Livingston, Montana, for an immoral purpose, to-wit: with the intent that she should become the concubine of the defendant. The court held, that the Mann or White Slave Act took possession of the subject of passenger traffic between the states in such a way as to make the offense charged within the exclusive cognizance of a federal court. This Act was considered by us editorially in referring to late decisions upholding its constitutionality. 76 Cent. L. J. 261.

It is not at all clear to us how the Montana statute could create such an offense as was charged by the information, without impinging upon the principle that no statute shall have extraterritorial operation. But putting that question to one side and agreeing with his honor that, if concubinage as a purpose is within the reach of the Mann Act, the offense charged was thereby taken out of state legislation, we wish to inquire what all-embracing test Congress may apply in regard to concubinage, and, incidentally, how might stand common law marriages under the principle in that Act?

Take it that concubinage means a male taking a female to live with him for the purpose of sexual intercourse with no words *de presenti* or *de futuro* regarding the formation of a marriage relation, we further assume, as his honor must have assumed, that Congress embraces concubinage in the clause "or any other immoral purpose" under the principle *ejusdem generis*. But suppose that Montana, though recognizing, we believe, the validity of a common law marriage, yet requires an age of consent which is above that of some other state, also recognizing common law marriage, for the contracting of any marriage whatsoever, we imagine that concubinage might exist from a pretended taking up in Montana, when it would be a common law marriage in the other state.

Justice McKenna said, in Hoke v. U. S., 33 Sup. Ct. 281, sustaining the Mann Act, that: "If the statute be a valid exercise of Congressional power, how it may affect persons or states is not material to be considered. It is the supreme law of the land and persons and states are subject to it." This is true, but what we are concerned about is whether it operates uniformly, so that it may be said that what is an "immoral purpose" affecting passenger transportation from one state to another is the same always, without regard to varying legislation in different states.

In this same decision the learned justice said the means for enforcing the power of Congress over transportation among the several states "may have the quality of police regulations." Does he mean by this that the national government has a police power, such as is recognized to exist in the states, or does he mean that it may assist in upholding a state's police power? The Webb Liquor Act is an example of the latter, and, if the learned Justice meant the former and the Liquor Act shall also be upheld, the "quality" spoken of by the learned Justice may have a two-fold aspect.

It may be noted here, that Mr. Justice Holmes said in the bank guaranty case, in effect, that police power represented "the predominant public opinion" of a state, and, therefore, it might vary very much even in declaring upon the constitutionality of state legislation. That is to say, if you may get behind a legislative enactment, the same law might be held valid in one state and invalid in another, a thought which, pushed far enough, might require all legislation pertaining to the police power to be adopted by popular vote.

But, taking it that police power is variable according to predominant opinion, then may not immorality appear in a certain act in one state and have no such taint in another? Thus a man pays for transportation of a girl in another state to come to him and become his common law wife. If she is old enough to contract marriage, this is not for an immoral purpose, at least if his state recognizes the validity of such a marriage. But if she is not thus old enough, why may not the state declare their living together concubinage and the Mann Act punish him for the furtherance of an immoral purpose?

But suppose the "quality" the learned justice speaks of, in regard to immorality, embraces Congressional concept of what that is independently of state view, then again conceiving that concubinage as a purpose is immoral, Congress may give its own definition of what it takes to constitute that relation or condition. It might say that any person paying the railroad fare of any female minor so she may come to him, without her parent's or guardian's consent, to be his common law wife, should be an act in furtherance of concubinage, this being an immoral purpose within the reach of national police power, if there is any such power.

This is sufficient to suggest that Congress, with an independent police power, could invade the field of domestic relations of state residents. If it may, so far as minors, who otherwise may, according to state law, contract marriage and bear legitimate offspring, why may it not as to adults? If it may say that a common law marriage by a minor is an immoral marriage, when the wife is brought by the husband from another state, the general law of the state to the contrary notwithstanding, why may it not say that it is immoral to pay the fare of a woman of full age who is to enter into such relation in a state where common law marriage is held void and the offspring bastardized? This would be a less thing to do than the other.

The case of Athanasaw et al. v. U. S., 33 Sup. Ct. 285, another of the Mann Act cases, seems to us to show that construction of this legislation will be in a liberal, rather than in a restricted, way. There the conviction was under an indictment charging the purpose to be "debauchery," and it became necessary to define the meaning of this word.

Justice McKenna, again speaking for the court, held the defendants rightly convicted where they engaged a girl in Georgia to appear as a chorus girl in a musical comedy in Tampa, Florida, and paid her transportation to the latter point, put her in the midst of promiscuous, ribald company upon her arrival, during time of rehearsal, and one of the defendants made improper proposals to her. She complained and was taken away by the police.

The court said: "The employment to which she was enticed was an efficient school of debauchery of the special immorality (sexual intercourse) which defendants contend the statute was designed to cover." It was also said, approvingly, that: "The (trial) court put it to the jury to consider whether the employment to which the defendants called the girl and the influences with which they surrounded her tended 'to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually,'"

Therefore, there is no cheese-paring to be expected as to this Act nor any disposition to suggest any limitation of power in Congress in its cognizance of immorality.

NOTES OF IMPORTANT DECISIONS

COMMUNITY PROPERTY—HOMESTEAD ACQUIRED UNDER PUBLIC LAND LAWS.—It seems clear that when title has been acquired by full compliance with the public land laws, generally it should be subject to state laws of descent and distribution, because they apply to the distribution of all the estate owned by a decedent at the time of his death howsoever he may have obtained title thereto, if that title be lawful. But there is a suggestion of a distinction in regard to community property. The test of property being community property that it is acquired by the efforts of either or both spouses during marriage, what they or either have before or shall be inherited by or donated to either of them is separate property. In Buscher v. Morss, 202 Fed. 854, decided by Ninth Circuit Court of Appeals, it was held that state decision of Washington state holding title under homestead entry to be community property was correct. This ruling was predicated on a principle found in Wilcox v. McConnel, 13 Pet. 498-516, which merely held: "That whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

To us this principle seems against what it is called to support. The United States vested the full and entire interest and title in the husband, the homesteader, and instantly by state law that full and entire title is partially divested, that is to say, no longer his alone and entire, but it belongs to a community of which he is a member, and subject to every provision of law governing such a community. On the other hand, however, it might be said that this reasoning, in its last analysis, would cut out operation of dower statutes or any law restraining the free alienation of such property. These, however, are things which may relate merely to interest surviving death and over such a state has control. The other is an ipso facto change of title by operation of law subject to a superior law. But it is hard to discern, in general aspect, that our public land law system intends to interfere with state policy regarding what should become of property acquired by observance of its regulations, and we may go back of the vesting of title to show by what means and when it was acquired.

FEDERAL AND STATE CO-OPERATION ON RATES.

It is feasible for state railway commissions to co-operate with the Interstate Commerce Commission in solving the question of intra-state as related to inter-state rates and fares, and vice versa?

Would such character of joint action, and administrative determination pursuant thereto, be legally tenable under the federal system?

It is believed that both of these questions should be answered in the affirmative.

The co-ordinate departments of state governments are as certainly and as devotedly concerned, and as lawfully invoked, in the process of local or state supervision and control of public carriers, as are those of the federal arm of the government concerning inter-state carriage. This being true, and the subject in hand being peculiarly within the view and potential oversight of the state authorities, it would seem safe to conclude that, in an assembly of conference between a given number of state boards and the Interstate Commerce Commission, upon the question of proposed state rate schedules embracing the states thus locally represented, the sum of information, opinion and judgment expressed by the state boards should be regarded as superior to that of the federal commission. Among other reasons why this should be true is that, in arriving at a conclusion as to the local necessity for, and the mutual fairness as between the public and the carriers, of the proposed rates and fares here supposedly under such joint consideration, the local boards must be regarded as having diligently and intelligently considered existing inter-state rates and fares, as

related to existing or proposed in-rates, as well as those obtaining locally, and to have compared the former with the latter, and also the relations between and the relative fairness or otherwise of the various schedules in the states so represented, as between themselves. For it is matter of common knowledge that the state boards of railway commissioners, in current administration, do consider these various elements of the questions involved, and, indeed, find it necessary to do so in order to reach intelligent and just conclusions in the premises.

It would seem to follow from the foregoing, as a further fair deduction, that such a conference between several state boards and the federal commission, could not fail to in some degree enrich the intelligence and strengthen the judgment of the latter board concerning not only the reasonableness or otherwise of the existing inter-state rates and fares thus involved but the relations then existing between, as well as those which should exist between the in-rates and the inter-state rates.

On the other hand, such a conference would as certainly shed some new and valuable light upon the case thus presented, as viewed by the state boards, through special knowledge and resulting superior judgment of the Interstate Commerce Commission regarding the existing inter-state schedules, and their relations to in-rates involved, imparted by its members to those of the state boards.

That a mutual desire on the part of the state and federal commissions to obtain new information and suggestions from the other, should exist at all times, would seem to be axiomatic. And that the net result of such a conference would be the further maturing of the judgment and efficiency of both the state and federal boards, concerning their respective functions, is undeniable. And to the extent that such joint action resulted in tentatively fixing upon the basis of proposed new and mutually satisfactory, reasonable and fair intra-state rates and fare, by such state boards, and upon inter-state rates by the federal board, a long step would have been taken towards reducing the amount of statutory investigation concerning in-rates as related to inter-state rates, and vice versa, involved in hearing complaints, as well as towards eliminating court litigation resulting from unsatisfactory action of the boards. And such interchange of views between the federal and the state boards would bear directly upon and improve the functions of the Interstate Commerce Commission, wherein it finds itself charged with the incidental duty of affecting and regulating intra-state commerce far enough to protect the freedom of and to regulate inter-state commerce.[1]

Pensacola Telegraph Co. v. Western Union Telegraph Co.[2] while the benefits of such co-operation would increase the capacity of the state boards to act intelligently in so regulating intra-state rates as not to substantially burden or regulate interstate commerce, although it may be thereby remotely or incidentally affected.[3]

If tenable, it is believed that such a process of exchange of views and co-operative action would be, or could easily be made practicable; that the necessary time for meetings and deliberation as suggested could be arranged for, through administrative regulations, supplemented by some additional legislation, state and federal. In considering this phase of the subject, it can be said that it would not be necessary for the full membership of either the federal or the state boards to come together in carrying out the processes contemplated in this paper. Representatives of the several bodies, as delegations or committees, could be charged in some authoritative manner with the duty of attending such joint conferences, at stated times and places previously fixed upon by the federal commission alone, or through some arrangement between it

(1) Brown v. Maryland, 12 Wheat. 448; Caldwell v. North Carolina, 187 U. S. 623; Gulf, Colorado, etc., Ry. Co. v. Heffey, 158 U. S. 98.

(2) 96 U. S. 1.

(3) Norfolk & Western Ry. Co. v. Pennsylvania, 136 U. S. 114.

and the state boards whose functions were called into action by the particular rate or fares problem in hand. Certain tentative discussion of such problem could be had by the state boards, in advance, and, if deemed necessary, by the Interstate Commerce Commission; in which preliminary deliberations certain conclusions concerning rates or fares could be arrived at as a basis for the proposed joint discussion and action; as the result of which each delegation or committee would be able to bring into joint assembly certain specific propositions, for or against a set of existing, or proposed schedules, and would urge their respective views in support thereof, subject to such modification, or adverse action as the wisdom of the joint deliberation might suggest.

Again: If the utility of such co-operative action were conceded in advance, or was found, after repeated efforts of this character, to be productive of beneficial results in the general direction above indicated, the practicability of such a plan as a permanent feature of administration in the premises could be expedited, and eventually vindicated, in one of several modes of action. It would probably be found that such joint discussion, exchange of views and advocacies, and action pursuant thereto, would result in accomplishing ends, in the readjustment of rates and fares, intra-state or inter-state, or both, by more practical, inexpensive, expeditious and effective methods than those now existing. Incidental arrangements could be made by the Interstate Commerce Commission to enable the carriers, and complaining shippers, if any, to be heard at the joint meeting; and that incident, as to the state boards, could be effected through similar action by the latter. There would probably result a mutual saving of time which in the end would enable both sets of boards to bestow more time in such joint deliberation and action than was thought possible in the outset. And if such utility and effectiveness were demonstrated in a series of preliminary, or experimental joint conferences, the state legislatures and the Congress could readily enlarge the membership of the respective boards, if deemed expedient, for the purpose of enabling them to expend more time in this mode of joint action and in perfecting such a system as a permanent feature of administration, state and federal.

If then, the questions of practicability and utility of such joint discussion and co-operative action were demonstrated by actual experiment, to the satisfaction of the federal and state boards, and the governmental authorities behind them, the further question whether, and if so how far such joint deliberation and action, if made mandatory and declared effective by statute, as regards the federal and the state governments, would be justified under our federal system, would of course arise. The questions involved would seem to be that of empowering the federal and state boards of railway commissioners, respectively, to enter into such joint deliberation and action, and that of providing that such action should be legally effective through ratification by the respective boards, as regards the subject of fixing, and of altering rates and fares, intra-state and inter-state, as the result of or the sequel to the joint action, under and pursuant to the federal, and the state constitutions.

And in determining the question of the tenability of such proposed legislation, the discussion would go on in the light of what had already been done experimentally, by the respective boards. And in discussing what had thus actually occurred, it would be seen that all that had been done was effected through the simple process of voluntary action in the delegation of authority by the respective boards, to their respective committees or other representatives, to meet with and to urge tentative propositions before the joint conference, and to report back to their respective bodies the result of such conferences and consequent action—none of the boards, state

or federal, being legally bound by such joint action, until confirmed by the respective boards acting normally In other words, it would appear that the beneficial results attained experimentally, although done informally and outside of the pale of specific statutory authority, had been accomplished without violating any law, state or federal; since such joint action would not in fact or by intendment be, per se, legally binding upon any of the commissions involved.

While no actual work seems to have been done thus far, by way of co-operation in a joint conference, between the state boards and the Interstate Commerce Commission in seeking to tentatively settle upon a set of rates or fares, intra-state or inter-state, involved in proceedings pending before either set of boards, yet this subject has been one of repeated and earnest suggestion and recommendation before the conventions of the National Association of Railway Commissioner; in which assemblies members of the Interstate Commerce Commission have annually for many years sat in deliberation with those of a large number of state railway commissions, involving discussions as to ways and means of prompt and effective determination of the questions of rates and fares, and many other phases of the work of the respective commissions which regularly come up for debate and recommendation. So clearly has that Association put itself on record in this particular, that no doubt can arise as to co-operative consideration of rates having been deliberately recommended by members of the Interstate Commerce Commission, including some of its chairmen, before that Association. To go no farther back than 1908, we find Mr. McChord, chairman of the Association, declaring, in opening his annual address:

"The necessity for co-operative and concerted action between the Interstate Commerce Commission and the state railroad commissions in every phase of the regulation of railroads has been advocated and approved by every convention of this association since it was organized in 1889." He there refers to the expressions of Judge Cooley, in whose address at the first session of that organization the latter said, speaking of the relative work of the two sets of railway commissions: "We are all engaged in a kindred work, and not a kindred work merely, but in a large degree in the same work. What is often spoken of as the railroad system of the United States is an illustration of unity in diversity, such as it would be difficult to find elsewhere in the world." Mr. McChord then refers to the remarks of Judge Knapp, then chairman of the federal commission, made at the preceding convention, where the latter observed that, regarding public interests, and independent of legislation, "we have an opportunity for very useful service . . . by harmonizing as far as we possibly can our policies and our work of administration." Mr. McChord then refers to the additional powers granted to the federal commission by the Hepburn Act, and observes: "Now that these additional powers have been conferred and as the intra-state regulation of railroads is so closely allied with that of inter-state regulation, it is but natural that the state commissions are looking to the Interstate Commerce Commission for closer co-operation in the struggle they are making against such great odds in their efforts to regulate the railroads of their respective states." The "importance of co-operation of state governments and the federal government in the regulation of rates" is emphasized in view of judicial decisions adverted to; and he makes this specific recommendation:

"We believe that a practical and feasible plan of co-operation, would be that when complaint has been filed with the Interstate Commerce Commission, and a copy served upon the defendant carrier, and it is cited to appear and defend, . . . the commissioners of the states affected by that complaint should be furnished with similar copies and notices and be granted leave to intervene or submitting argument in support of or

against the relief sought by the complainant, and, in a similar way, when complaint has been filed with the state commissions, which would, of necessity, affect interstate rates, a copy of such complaint should be furnished the Interstate Commerce Commission, and both state and federal commissions should feel free to call for such information as each may possess bearing upon the subject matter under investigation. In short, if the state and federal commissions are to co-operate in this work, and if there is to be preserved to the state commissions their present usefulness and the limited powers yet left them, something tangible along these lines should be agreed upon by this association and should be carried out without further delay." That "it is clear that if the Interstate Commerce Commission is to effectually co-operate with the various state commissions it must have some officer or representative whose sole duty it is to keep constantly in touch with these state commissions and keep a record of all that they are doing." And after observing that "under our dual form of government the state commissions are at last at the mercy of the federal authorities," he adds: "Therefore I am firmly of the opinion that the federal and state commissions should get together in the beginning of these investigations, and by mutually co-operating and assisting each other be in better position to maintain in the courts their respective orders when made."[4]

In 1909, Mr. Decker, President of the Interstate Commerce Commission, in his address at the annual convention of that Association, spoke of the trade elements which "create a lasting interpendence between the states and the nation in regulation of our commerce."[5]

In 1910, the same distinguished official said in a similar connection: "We have about reached the time, I think, when investigation of related railway rates may properly include conferences between regulating commissions before determination." That, the line of demarkation between state and federal jurisdiction being, fundamentally, determined, harmonious action is promoted by "trying through conferences and co-operation to bring about rates and rate rules based upon consideration of right and justice to all concerned." That "the association through its committees may work actively towards securing harmonious action," and "many things that remain to be accomplished may be constantly progressed under the larger comprehension and broader outlook resulting either from special conferences between particular commissions or as the result of the work of committees acting under the authority of this association." That "still greater effective work can be done by the various commissions through associated action. . . . To that end it would be advisable for the various commissions to so arrange their own engagements that their members may participate actively through the year in the general but highly important work as fixed by the association in convention. It is worthy of careful consideration whether conferences between state commissions and the Interstate Commerce Commission concerning the work in which any state commission and the federal commission may have joint interest would not be valuable."[6]

In 1911, Judge Clements, chairman of the Interstate Commerce Commission, in his annual address before that association, said: "It would be useless for me to repeat what all know, and that is that the conferences and sessions of this convention, and the recommendations of the association and the co-operation between the Interstate Commerce Commission and the state commissions and between the state commissions themselves, have been of the utmost value to all of us and to all who are

(4) Proceedings of National Association of Railway Commissioners, 1908, pp. 10-14.

(5) Proceedings of National Association of Railway Commissioners, 1909, p. 10.

(6) Proceedings of National Association of Railway Commissioners, 1910, pp. 10-13.

engaged in this most important work of railway regulation."[7]

The foregoing quotations from addresses made before the National Association of Railway Commissioners clearly indicate, that the scope of suggested and proposed action between state commissions themselves, and between them and the Interstate Commerce Commission, embraces not merely the deliberations and consequent action of that association, but conferences between the various sets of state boards, and also between such of the latter as may be involved in determining a pending question and the federal board, wherein the latter may find its functions operative in determining the relations between the in-rates and the inter-rates thus actually or possibly involved; and also the proposition of action by such state boards and the federal commission, in becoming, by intervention or otherwise, parties to pending proceedings before either or any of those bodies, and in being heard in the determination of the question involved, through counsel and also through committees or delegations. Thus "co-operative and concerted action;" "closer co-operation;" "harmonizing of policies;" freedom in "calling for information;" "effectual co-operation" between the federal and state boards through "some officer or representative;" "getting together in the beginnings of these investigations" and "by mutually co-operating and assisting each other;" to "create a lasting interdependence between the states and the nation;" and "conferences between regulating committees before determination," under "the larger comprehension and broader outlook" resulting from "special conferences between particular commissions" "through the year"—all these proposed expedients are evidences of serious consideration and urgent recommendation at the hands of the highest deliberative body existing in this country as the representative of the administrative functions of our state and federal boards in regulating and controlling commerce, state and national.

Now, while some of these various recommendations may not have been intended to mean joint deliberate action on rates, in the sense of expressing formal conclusions into which both state and federal administrative action enter in a responsible way, yet the terms actually used do mean just that character of work. Co-operation is the act of "co-operating, or of operating together to one end; joint operation; concurrent effort or labor." Conference means "formal consultation," "interchange of views;" or "a meeting for consultation, discussion, or instruction." While "concerted action" is indicated by the verb "concert," which means "to plan together; to settle or adjust by conference, agreement, or consultation."[8]

If these defined means to the end are not broad enough to comprehend and to justify the expedients suggested in this paper, it is difficult to understand how they can be interpreted to mean less than that.

Suppose then that Congress, and the legislatures of the various states, or some of them, shall enact legislation providing for such conferences as may be deemed necessary or expedient, between the state boards and the Interstate Commerce Commission, concerning pending rate questions existing either independently of, or under, complaint, and embracing provisions for presenting evidence bearing upon the questions at issue, by or before the respective boards; that the findings and conclusions arrived at in such conferences regarding questions not then in litigation shall, when ratified by each board acting by itself, be legally binding upon the respective participating boards, and further declaring binding upon each state board and the federal commission conference findings and conclusions in litigated cases where carriers are parties or are represented—that

(7) Proceedings of National Association of Railway Commissioners, 1911, p. 5.

(8) Webster's Dictionary.

is, binding, upon such ratification, upon carriers, complainants, and state boards wherein the joint action related to intra-state traffic, and upon the same parties and the Interstate Commerce Commission when related to inter-state traffic. That such federal legislation was designed to operate as a complement to similar legislation by the respective states, and vice versa concerning legislation by the latter. That through such dual system of legislation cases, or pending questions, involving the fixing or changing of both in-rates and inter-rates were consolidated in the sense that questions pertaining to intra-state traffic, in one or more states, the determination of which questions would or might affect inter-state traffic and rates, could be tentatively determined by the federal commission acting in conference with the state boards; and containing a complementary provision enabling the federal commission and other state boards to participate in like manner in the tentative determination of similar issues pending before a particular state board, with like binding force upon the federal commission as to inter-state rates after ratification by it; such joint conclusions not to be regarded as in law constituting an administrative decision, or the equivalent of due process of law in the quasi-legal sense or otherwise. That carriers, and shippers, in order to be bound by such a proceeding, could participate therein by becoming parties under issues presenting specific questions, with the right to submit evidence and be heard argumentatively, both as to state and inter-state traffic issues if and when presented, and with the further right to be heard in the separate state or federal commerce tribunal when the question of ratification or rejection of the joint conclusions was presented in such separate body; with or without further provision requiring carriers, under certain specified circumstances, to become parties to such proceeding. Would such a system of procedure be tenable? And if not, why not?

Each state element in such conference would present issues involving the case in hand as related to intra-state rates and fares in the particular state or states. The findings and conclusions would therefore meet those issues, as fully as if the particular state board or boards had acted alone in considering them. The same would be true of the federal commission regarding issues as to inter-state schedules. The tentative findings and conclusions would therefore as fully cover all issues of both characters as would be the case if separate initial determinate action had been resorted to. There would, in consequence, be found a record of the joint conference in question, presenting a juridical repository from which the state and federal boards, respectively, and the carriers and complainants as parties, could draw in making up for presentation before any separate board at its ratification session such partial record embracing issues pertaining to the functions of such separate board, as might be necessary for such purpose.

The mere fact that in such conference a board created by and accountable solely to the federal power, and limited in its administrative acts and determinations to functions concerning inter-state commerce, had actually participated in drawing conclusions concerning intra-state commerce, would not in law vitiate those conclusions. This is obvious, since all that would have been done by the federal commission would be merely advisory, and the state board or boards would merely have had the benefit of the views and judgment of the federal commission in support of such conclusions. The conclusions themselves might or might not have been actually assented to although nominally acquiesced in by such board or boards; if they had not, those boards would at the respective future ratification sesproduced. or upon that and further evidence. Equally sound upon similar reasoning would seem to be the contention that mere participation by state boards in such

conference conclusions, wherein they referred solely to interstate rates, would not vitiate such conclusions. And this contention as applied to either case is strengthened when we reflect that in lending such mutual aid, each and all representatives or committees of boards in question would, in thus co-operating, be simply using their faculties of judgment precisely as they would if acting normally; since every question of state rates would or might involve, incidentally, its relations to interstate rates, and vice versa.

If it be objected to the plan of joint procedure above outlined, that it presents a medley of state and federal elements of administrative deliberation and adjudication, involving confusion as to the identity of the tribunal in which the conference deliberation and hearing was had, and before which the parties, carriers and otherwise, would thus appear, or as to the issues as related to those elements, it would seem that by adopting rules and regulations pursuant to appropriate state and federal legislation, this phase of the subject could easily be met, to the end of preserving the rights of complainants and other litigants on the record, concerning their attitudes, objections and exceptions as related to both state and federal elements of action so involved, as well as before the future respective ratification sessions.

Some practical difficulty might be encountered by the boards of those states other than that in which the particular joint conference met, in the production of evidence beyond the state limits, for use before the conference, and in enforcing the appearance of witnesses. However, to the extent that such difficulty might be anticipated in a given case, the taking of testimony and incidental evidence within the particular state might go on before an examiner, or some state official, the depositions so taken to be used both before the joint and the subsequent hearings. Again: The question of evidence might, under a somewhat different procedure, be solved by some means whereby the conference conclusions could be made to rest upon *some* information and evidence calculated to raise a presumption of their reasonableness and fairness, the issue to be finally contested at the respective ratification sessions; with the right to produce further evidence both by way of attack and in support of the action of the conference.

There seems to be no sufficient ground for the conclusion that such a conference procedure would be violative of the federal constitution. If it would, the conclusion would seem to be warranted because due federal procedure had thus been defeated, or federal jurisdiction in the Interstate Commerce Commission had been injuriously invaded by concerted action between it and a state board or boards, through encroachment by state authority upon the field of federal power. And such a result of co-operative action would also affect the right of a carrier, as a party to a proceeding before the federal commission, to appear and be heard before that body as a distinct, independent tribunal capable legally of making and enforcing a valid order, involving directly and vitally interstate commerce.

But unless due process under federal jurisdiction had been defeated or unduly obstructed by such joint action, the federal constitution would not have been invaded by such participation of a state board or boards.

But jurisdiction, in order to be subject to such invasion, must be in course of exercise to the end of a determination of an issue or right in the particular proceeding and forum.[9]

However, no such determinate function has been imputed to such a joint deliberation in conference as we have hereinbefore supposed to be in existence. On the contrary, we have assumed that the proposed legislation would go no farther than to render the conference act merely tentative, or advisory, postponing final or determina-

(9) Brown on Jurisdiction, Sec. 1. United States v. Arredondo, 6 Pet. 709; Pittsburg, etc., R. Co. v. Backus, 154 U. S. 421; 10 Am. and Eng. Encyc. of Law, pp. 290, 300.

tive action to the future and separate proceedings of the respective boards constituting the constituent elements of the conference. And such being the character of the deliberations of the joint conference, the co-operation of the state boards could not have the effect of destroying or substantially invading federal jurisdiction or power, operating in determinate action.

The principle we have assumed to be applicable to a proceeding pending before the Interstate Commerce Commission, when a state board is supposed to be acting in conjunction with the former, would seem to apply with equal force to the conference action if the relations between the two sets of boards were reversed and the federal commission were participating in a proceeding pending before a state board of railway commissioners. In either case, the fact that issues primarily determinable solely by the board to whose membership the other board had acceded for purposes of the conference, were considered by such acceding element, would not amount to an invasion of federal, or of state, power of jurisdiction, as the case might be.

If such a system of treatment of questions of rates and fares as is outlined in this paper were in force, it would seem that its utility in advancing the cause of prompt, simple and effectual settlement of problems involving groups of schedules and territory would be proven beyond dispute. If, for instance, such a complexity of questions or relations and prospective disturbances between in-rates and inter-rates and fares as that of the Minnesota Rate Cases[10] could have been dealt with through conferences of the general character hereinbefore indicated, followed by final administrative action by the state boards in fixing and in changing in-rates and fares, and by the federal commission in readjusting those of interstate character as related to the state schedules involved, after hearing upon evidence, the various carriers interested being parties, is it to be doubted that such joint action and subsequent determination would have resulted in a readjusted system of schedules which, although not in all respects such as would have entirely eliminated litigation thereafter concerning such settlements and schedules, would yet have been mutually satisfactory to the railway commissions and the railroads in all or nearly all main aspects of the general problem? The state boards of, say Minnesota, North Dakota, Montana and Wisconsin, might have thus met at St. Paul with a delegation of the Interstate Commerce Commission, after the respective phases of the proposed action of the Minnesota board, as they would appear to the other boards, state and federal, had been considered in advance and a set of suggestions and contentions had been framed by them, respectively, for such joint consideration; the various carriers affected could have appeared at the conference and been heard in the light of more or less evidence adduced by them and by the boards; a tentative set of schedules could have been framed by the conference, each set being thereafter taken up by its appropriate board and confirmed in whole or in part, with such modifications in detail, if any, as might have been deemed proper, the carriers and boards bringing into these separate final hearings such contentions and further evidence as the laws and rules of practice would permit.

Such a system of procedure would also be almost certain to result in more or less periodical conferences looking to successive readjustments of rates and fares, upon some general plan or plans of consideration wrought out as a further consequence of the establishment of the initial practice itself. In this way large areas of territory, embracing a multitude of related rate problems, would in time come to be treated under some well-defined system of administrative management and subjection to hearings for the joint benefit of the carriers and the public.

The time has indeed come for serious general consideration by the public of any and all possible expedients under the ad-

(10) Shepard v. Northern Pac. Ry. Co., et al., 184 Fed. Rep. 765.

ministration of the state and federal railway commissions, through which to simplify, expedite and effectuate modes of adjustment of rates and fares under the rapidly changing circumstances and conditions surrounding state and interstate commerce. If some plan of joint action to that end, similar to, or widely differing from the one outlined in this paper, can, after due discussion and investigation, be established, the sooner such a desirable end is accomplished the better it will be for the general welfare.

CHAS. E. DELAND.

Pierre, South Dakota.

CHATTEL MORTGAGE—AFTER-ACQUIRED PROPERTY.

TITUSVILLE IRON CO. v. CITY OF NEW YORK et al.

Court of Appeals of New York. Dec. 31, 1912.

100 N. E. 806.

Mortgages or contracts, pledging subsequently acquired property, will be enforced in equity as between mortgagor and mortgagee as agreements for liens and as against purchasers with notice, but will not be enforced against creditors.

CULLEN, C. J. * * * At the time of the execution of the contract Hillman had no title to the property, the subject of this suit, nor does it appear even that the property was then in existence. Therefore he could create no lien thereon cognizable at law, whether by way of mortgage, pledge, or otherwise. "It is common learning in the law that a man cannot grant or charge that which he hath not." See Thomas on Chattel Mortgages, § 157; Jones on Chattel Mortgages, § 138.

Mortgages or contracts pledging subsequently acquired property, though void at law, will nevertheless be enforced in equity as between mortgagor and mortgagee as agreements to give liens, and also as against purchasers with notice. McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811. But it seems settled law, at least in this state, that they will not be enforced as against creditors. Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635; Zartman v. First Nat. Bank of Waterloo, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083. In the first case Judge Gray said: "The proposition that a mortgage upon chattels having no actual, nor potential, existence, can operate to charge them with a lien, when they come into existence, as against an attaching, or an execution creditor, has frequently been discountenanced and repudiated." 142 N. Y., page 575, 37 N. E., page 633, 40 Am. St. Rep. 635. In the second, Judge Vann said: "In other words, the agreement and intention of the parties to a mortgage upon property not yet in existence will be given effect by a court of equity so far as practicable, provided no interest is affected except that of the mortgagor and mortgagee, who entered into the stipulation, but equity closes its doors and refuses relief if the interests of creditors are involved. The result thus announced is founded on principle and sanctioned by authority." 189 N. Y., page 272, 82 N. E., page 128, 12 L. R. A. (N. S.) 1083. In the opinions in these two cases the authorities are so fully examined and discussed as to make further review unnecessary.

The title of the contractor passed to the receiver in bankruptcy before the forfeiture authorized by the contract had accrued or the defendant taken possession, and the decision in Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, as well as that in the Zartman Case, supra, are authorities to the effect that the trustee can assert the rights of creditors. We must not be misled by some of the early decisions of the Supreme Court of the United States which were made in cases arising under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). Under that act the assignee succeeded only to the title of the bankrupt except in cases where, by the express terms of the statute, certain transactions were made fraudulent and void as against the act. So it was held in Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816, that the assignee could not attack chattel mortgages void against creditors by reason of the failure to file them in the proper place. In Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075, an agreement somewhat similar in effect to that before us was held to create a lien good between the parties, even though void as against subsequent purchasers without notice and creditors levying executions and attachments, and therefore immune from attack by the assignee in bankruptcy. This rule, however, has been changed by the present statute, which enacts that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be

liens against his estate." Therefore the title of the plaintiff was superior to any lien of the defendants. * * * *

The judgment appealed from so far as relates to the defendants board of education and Olvany should be reversed and a new trial granted, with costs to abide the event.

NOTE.—*Voluntary Surrender and Taking Possession Under Mortgage Valid Only Between the Parties.*—It is not sought herein to consider any cases except those concerning after-acquired property, because we believe it to be quite universally held that in mere defects in execution, possession, however lawfully acquired by mortgagee validates. As to mortgages constructively fraudulent there seems a distinction between possession obtained by consent and that against consent, of mortgagor, some courts holding the former is required to validate, while others take the view that the original agreement and possession thereunder suffice.

Little v. National Bank, Ark., 133 S. W. 166, affirms Lund v. Fletcher, 39 Ark. 325, 43 Am. Rep. 270, held as does the principal case in a case of mortgage on a sawmill plant including lumber and all lumber to be subsequently acquired, this being like a mortgage on a stock of goods and what is bought to replace what is sold in due course of trade. In the Little case, the mortgagee took possession of the mortgaged property, under agreement with mortgagor after default, and afterwards the possession came to a receiver for the mortgagor. This taking possession was held to cure the defect. The principal case does not speak of possession having been taken, and Zartman v. First Nat. Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083, rules expressly that such does not enlarge, perfect or complete mortgagee's lien, as "a mortgagee cannot add to his title by his own act," citing Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11. The taking possession in the Zartman case was on voluntary surrender to the trustee.

The Zartman case also shows that it attempts to discount, so to speak, the ruling in Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, as being a decision by a federal court following state decision. The Thompson case said, however quite broadly in the case of a taking by consent of mortgagor that such made a relation back to the time of the execution of the mortgage, "as it was only by virtue of that mortgage that possession could be taken."

In Ohio, however, it was said to be immaterial whether the mortgagee took possession with or without the consent of the mortgagor, if it was taken under authority contained in the mortgage, in either case he could hold the after-acquired property against any subsequent process in a suit by creditors. Francisco v. Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711.

In a Missouri case the mortgagor refused to surrender possession and the mortgagee obtained possession by replevin. There it was urged that validation could only be affected by a consent possession. The court said: "This position, however, is untenable. By the express terms of the mortgages, it was provided that in case of default, etc., or if the mortgagees should consider themselves unsecure, they might take possession of any part or all of said merchandise, and the taking possession under an order of delivery, issued in the action of replevin instituted by the plaintiffs to obtain possession under the mortgages, was but a taking by and with an agreement entered into by the mortgagor, and was all that was necessary." Barton v. Sitlington, 128 Mo. 514, 30 S. W. 514. This is not very satisfactory reasoning, because the theory is that the mortgage is void as to creditors unless something afterwards is agreed to by mortgagor and acted on by the mortgagee before the creditors acquire a lien.

In Kansas it is said it is immaterial whether mortgagee takes possession *in invitum*, or the mortgagor voluntarily puts him in possession, if the act be done in pursuance of a condition contained in the mortgage. Gagnon v. Brown, 47 Kan. 83, 27 Pac. 104. But there does seem to exist a distinction between a voluntary delivery by mortgagor and a taking of possession under the mortgage but against mortgagor's consent, the former being held to validate even a constructively fraudulent mortgage against creditors, while forcible possession by the mortgagee does not go this far. Fathburn v. Berry, 49 Kan. 735, 31 Pac. 679, 33 Am. St. Rep. 389.

In Martin v. Halloway, 16 Idaho 513, 102 Pac. 3, it was held that delivery of possession to the mortgagee in advance of the mortgage falling due operated to validate it. Of course, in this case there could have been no taking of possession *in invitum*. But the case is useful in showing how far a possession by consent may extend. We take it that Thompson v. Fairbanks, *supra*, is to be classed with the Zartman and Fathburn cases that only consent possession suffices to validate a mortgage constructively fraudulent. C.

CORRECTION

HUNT ON ACCORD AND SATISFACTION.

In review of this work, 76 Cent. L. J. 309, we stated it was published by West Publishing Co. Instead, we should have said Vernon Law Book Company, Kansas City, Mo.

HUMOR OF THE LAW

At Denver a few weeks ago a colored woman presented herself at a registration booth with the intention of enrolling and casting her first vote in the ensuing election.

She gave her name, her address, and her age; and then the clerk of registration asked this question:

"What party do you affiliate with?"

The woman's eyes popped out.

"Does I have to answer dat question?" she demanded.

"That is the law," he told her.

"Den you jes' scratch my name offen dem books," she said. "Ef I got to tell his name I don't want to vote. Why, he ain't got his divorce yit!"

And out she stalked.—Saturday Evening Post

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Assignments**—Without Recourse.—A written assignment of a money claim, which provided that it was without recourse on assignor, and merely transferred all his rights to the claim, relieved the assignor of any liability to the assignee because of the latter's failure to realize on the claim.—Maxfield v. Jones, Ark., 153 S. W. 584.

2. **Attorney and Client**—Scope of Authority.—An agreement by a bankrupt's attorney with a creditor that the bankrupt would keep certain goods, and that the claim for the value thereof should not be proven in bankruptcy, and that they would be paid for, was not binding on the bankrupt, where he neither authorized, ratified, nor received any benefits therefrom.—Gambrell v. Southern Moline Plow Co., Miss., 60 So. 1012.

3. **Bailment**—Lien.—Where defendant's hay without any fault on his part was placed by a third person in plaintiff's barn and cared for by plaintiff, and defendant did not remove or offer to remove it, though he knew the facts, and was notified that he would be charged storage, plaintiff, though having no lien, was entitled to storage charges.—Christopher v. Jerdee, Wis., 139 N. W. 1132.

4. **Bankruptcy**—Good Will.—Sale by a corporation's trustee in bankruptcy or the assets and property of its business, without its good will and trademarks, destroyed both the good will and trademarks as things of value, and precluded the trustee from thereafter selling them as property of the bankrupt.—In re Jaysee Corset Co., U. S. D. C., 201 Fed. 779.

5.——Practice.—After an adjudication in bankruptcy all liens and claims against the property of the bankrupt must be determined in the bankruptcy court; and on its appointment of a custodian and application therefor a receiver of the Chancery Court will be ordered to turn over all that he has received, less expenditures in caring for the property.—Kennedy v. American Tanning Co., N. J., 85 Atl. 812.

6.——Practice.—While a trustee in bankruptcy is vested in a qualified sense with all the assets of the bankrupt, he may decline to take such property as he deems burdensome and worthless, and title thereto remains in the bankrupt.—Dow v. Bradbury, Me., 85 Atl. 896.

7.——Preference.—A deposit in a bank by a depositor after the bank has knowledge of his insolvency, or at least after the bank is put on inquiry, to repay a loan, is a voidable preference.—Ernst v. Mechanics' & Metals Nat. Bank of City of New York, C. C. A., 201 Fed. 664.

8.——Preference.—A transfer by an insolvent to be a voidable preference must be on account of a pre-existing debt.—Ernst v. Mechanics' & Metals Nat. Bank of City of New York, C. C. A., 201 Fed. 664.

9. **Banks and Banking**—Depositors.—Where a bank had been adjudged insolvent, and a receiver appointed at the Attorney General's suit, in which the corporation was in effect dissolved the depositors could maintain a creditor's suit to reach unpaid stock subscriptions.—Drennen v. Jenkins, Ala., 60 So. 856.

10.——Notice.—That the president of a bank suing on a note was a stockholder and vice president of the payee and local attorney for an intermediate holder did not charge the bank with notice of the conditions of a contract signed contemporaneously with the note.—Robertson v. Commercial Security Co., Ky., 153 S. W. 450.

11.——Tracing Trust Fund.—Where a bank receives deposits with knowledge that it cannot pay its debts, and must fail in business the depositor may reclaim it if he can trace it into the bank's assets coming into the hands of the receiver.—Brennan v. Tillinghast, C. C. A., 201 Fed. 609.

12. **Bills and Notes**—Assignment.—A written contract assigning a note claimed to be then in existence, but which was lost, operated as an assignment of the note, whether the note was delivered or not.—Maxfield v. Jones, Ark., 153 S. W. 584.

13.——Negotiable Instruments Law.—The negotiable instruments act, generally speaking, merely codified the general principes of the law merchant as applied in states having no statute on the subject and was not intended to change the well-settled rule of commercial law.—Young v. Exchange Bank of Kentucky, Ky., 153 S. W. 444.

14.——Negotiability.—Note for purchase price of automobile containing waiver of exemption, agreement to pay attorney's fees, and provision retaining title to the automobile, held negotiable.—Bledsoe v. City Nat. Bank of Selma, Ala., 60 So. 942.

15. **Breach of Marriage Promise**—Mitigation of Damages.—Where the promise is denied, and the previous impure life of plaintiff is not pleaded in avoidance, the court correctly instructed

that, if such impure life did exist, it could be considered only as bearing on the credibility of the plaintiff's testimony, and in mitigation of damages.—Cox v. Edwards, Minn., 139 N. W. 1070.

16. **Brokers**—Compensation.—Where an owner of land agreed to pay a broker a fixed percentage for procuring a purchaser, his act in selling the land to a prospective purchaser at a lesser price will not entitle the broker to recover more than the price fixed by contract.—Martin v. Jeffries, Tex., 153 S. W. 658.

17.——Earning Commissions.—Where an owner employing a broker to procure a purchaser of a farm or specified tracts thereof sold a part of the farm to a prospective purchaser induced by the broker to examine the farm but refusing at the time to make a purchase, the broker had not earned commissions, not being the procuring cause.—Dillard v. Field, Mo., 153 S. W. 532.

18.——Estoppel.—An owner employing a broker to procure an exchange of real estate may not defeat a recovery of commissions on the ground that the wife of the customer procured by the broker did not sign the contract for the exchange of the properties, where such objection was not raised by the owner at the time of the termination of the negotiations.—Johnson v. Stewart & Hay Bldg. Co., Mo., 153 S. W. 511.

19. **Carriers of Goods**—Discrimination.—That a railroad's line was conjested is not an excuse for refusing a siding to a coal property, to other operators, and a reduction of the cars where the railroad afforded siding privileges to other operators would have prevented an increase of the total traffic.—Cox v. Pennslyvania R. Co., Pa., 85 Atl. 863.

20.——Limiting Liability.—A shipper's acceptance of an express company's receipt limiting liability for value unless a different value is stated is sufficient to justify application of doctrine that such company, when its rates are graduated by value may under Carmack Amendment limit its liability for loss to the declared value.—Wells Fargo & Co. v. Neiman-Marcus Co., 33 Sup. Ct. Rep. 267.

21. **Carriers of Passengers**—Free Pass.—A railway mail clerk accepting, when off duty, free passage in interstate transportation, does not forfeit his right to benefit of a local law charging a carrier with duty to exercise care for safety of gratuitous passengers, because his carriage may have been forbidden by Hepburn Act.—Southern Pac. Co. v. Schuyler, 33 Sup. Ct. Rep. 277.

22.——Practice.—Where a passenger injured in a derailment alleged a number of causes of the derailment, a showing that negligent derailment was by any one of the causes alleged would warrant a finding for plaintiff.—Southern Ry. Co. v. Adams, Ind., 100 N. E. 773.

23.—**Chattel Mortgages**—After Acquired Property.—Mortgages or contracts pledging subsequently acquired property will be enforced in equity as between mortgagor and mortgagee as agreements for liens and as against purchasers with notice, but will not be enforced against creditors.—Titusville Iron Co. v. City of New York, N. Y., 100 N. E. 806.

24.——Receivership.—A receiver should not be appointed where any other remedy will afford adequate protection to the applicant, or where it does not appear that, without it, the applicant will sustain irreparable loss.—Wright, Ala., 60 So. 931.

25.——Replevin.—Where a chattel mortgagee of a mule, who had power on default to take possession, the mortgage having been registered brought suit against a purchaser of such mule for "title and possession," he should be allowed to recover possession for the purpose of sale, although he could not recover title.—Butts v. Lucia, Tex., 153 S. W. 686.

26. **Commerce**—Employer's Liability Act.—The Federal Employer's Liability Act of April 22, 1908, supersedes state legislation and is exclusive as to the right of recovery for the death of a railroad employe, where the company at the time and place of the accident was engaged in interstate commerce.—Eastern Ry. Co. of New Mexico v. Ellis, Tex., 153 S. W. 701.

27.——Local Taxation.—Personal property in transit in interstate commerce is not subject to local taxation because within the limits of a county in which the owner resides.—Bacon v. People of the State of Illinois, 33 Sup. Ct. Rep. 299.

28.——White Slave Act.—Congress had power to enact White Slave Act June 25, 1910, making criminal transportation of women in interstate commerce for purposes of prostitution.—Hoke v. United States, 33 Sup. Ct. Rep. 281.

29. **Contracts** — Accepting Performance.—Where a person accepts cement work knowing that it is defective and executes a note in payment therefor, he cannot thereafter, in an action against him on the note, claim damages for the defect.—Dupuy v. Wright, Ala., 60 So. 997.

30.——Correspondence.—A contract by correspondence is complete when the answer containing a direct and unqualified acceptance of a distinct proposition is dispatched by mail or otherwise with due diligence after receipt of the offer, and before any intimation is received that it is withdrawn.—Shaw v. Ingram-Day Lumber Co., Ky., 153 S. W. 431.

31.——Consideration.—An indorser of a draft could not be held liable upon a promise to pay, made after she originally signed the draft for the drawer's accomodation; the subsequent promise not being supported by a new consideration.—Young v. Exchange Bank of Kentucky, Ky., 153 S. W. 444.

32.——Impossibility of Performance.—The promisor is not discharged of liability under a contract by impossibility of performance, unless caused by a change in the law, or by some action or authority of the government.—Greil Bros. v. Mabson, Ala., 60 So. 876.

33.——Plea of Necessity.—The plea of necessity is never a valid defense against the performance of a contract.—Poole v. Supreme Circle, Brotherhood of America, N. J., 85 Atl. 821.

34. **Corporations** — Creditors. — Corporate stockholders cannot legally agree that the corporation's capital stock shall be appropriated by them or some of them as against the claims of corporate creditors.—Spencer v. Smith, C. C. A., 201 Fed. 647.

35.——Disposal of Assets.—The assets of a corporation, including unpaid subscriptions to its capital stock, constitute a trust fund for the benefit of creditors, which cannot be disposed of by it without consideration, to the injury of creditors.—Niles v. Olszak, Ohio, 100 N. E. 820.

36.——Dissolution.—While a creditor's suit may be maintained in equity only when the creditor's legal remedies are inadequate in absence of statute, the legal remedy was inadequate, where the corporation had been in effect dissolved.—Drennen v. Jenkins, Ala., 60 So. 856.

37.——Foreign.—A foreign corporation which has brought suit to wind up an insolvent corporation, and holds shares of stock in the insolvent company, has a standing to move the Chancery Court to direct the domestic receiver to discontinue his attack on the sale by a suit in the federal court.—Denver City Waterworks Co. v. American Waterworks Co., N. J., 85 Atl. 826.

38.——Maladministration.—Equity can, at the instance of minority stockholders, on a showing of maladministration by the officers supported by the majority, appoint a receiver for a going and solvent corporation, to take charge of its business, and if it be shown to be necessary, to wind up its business.—Brent v. B. E. Brister Sawmill Co., Miss., 60 So. 1018.

39.——Resulting Trust.—Where all the real stockholders and a majority of the directors of a corporation appropriate funds for the benefit of the corporation's officers, leaving the corporation still solvent, there is no misappropriation which can be recovered on the theory of resulting trusts.—Watts v. Gordon, Tenn., 153 S. W. 483.

40.——Voluntary Manslaughter.—In the absence of a specific statute, a corporation cannot be indicted for voluntary manslaughter, on the ground that it is a misdeameanor, because a corporation cannot be held for an offense against the person.—Commonwealth v. Illinois Cent. R. Co., Ky., 153 S. W. 459.

41. **Criminal Evidence**—Confessions. — Confessions are prima facie involuntary, so that, unless the circumstances attending them show they were voluntary, they should not be admitted without evidence rebutting that presumption, and showing prima facie that they were voluntary.—Godau v. State, Ala. ,60 So. 908.

42.——Accessories.—There are no accessories in misdemeanors, but all are principals who aid or abet in the commission.—State v. Treweilder, Miss., 60 So. 1015.

43.—Misspelled Words.—A verdict "that the jury find the defendant 'guidy' and 'assess' his punishment," etc., was not vitiated by the misspelled words.—Alsup v. State, Tex., 153 S. W. 624.

44. **Damages**—False Representations. — A vendor, who assumes to have special knowledge of the value of property sold, of which vendee is known by vendor to be ignorant, who also knows that vendee relies upon his representations as to value is liable in damages for misrepresentations.—Ohlwine v. Pfaffman, Ind., 100 N. E. 777.

45.——Speculative.—Damages from defendant's conduct in calling plaintiff up by telephone during her husband's absence and ordering her in violent language to take charge of her husband's cattle, which were in defendant's field, causing plaintiff, then recovering from an illness, bodily pain and mental anguish, were too remote to authorize an action therefor.—Kramer v. Ricksmeier, Iowa, 139 N. W. 1091.

46.——Stipulated.—Stipulated damages will not be treated as a penalty, when there is practical equality between the stipulated sum and the actual damages.—Vaulx v. Buntin, Tenn., 153 S. W. 481.

47. **Death**—Widow's Action.—In a widow's action for death of her husband while in defendant's employ, evidence was admissible that plaintiff had no other means of support than her husband.—Kettelhake v. American Car & Foundry Co., Mo., 153 S. W. 552.

48. **Deeds**—Delivery.—Title does not pass under a deed until delivery, no matter when signed and acknowledged.—Brown v. International Harvester Co., Ala., 60 So. 841.

49.——Undue Influence.—The influence which will avoid a deed cannot proceed alone from sympathy or affection for the grantee, but must be such as to dominate the grantor's will and coerce it to serve the will of another in the act of conveying.—Stroup v. Austin, Ala., 60 So. 879.

50. **Divorce**—Alimony.—A husband's ability to pay temporary alimony is to be determined with reference to his earning capacity as well as his invested capital.—Ex parte Whitehead, Ala., 60 So. 924.

51.——Condonation.—Condonation of acts of cruelty by a husband against his wife is conditioned on subsequent good conduct, and is not a defense, in an action for divorce, if he is guilty of cruelty after condonation.—McNamara v. McNamara, Neb., 139 N. W. 1045.

52 **Dower**—Equity.—An assignment of a widow's right to dower before its allotment to her will be upheld in equity, and the rights of the assignee protected, where a valuable consideration was paid, and there was no fraud, imposition, or undue advantage.—Wilson v. Roebuck, Ala., 60 So. 870.

53.——Widow's Right.—Where a widow's dower right in lands not alienated by her husband was recognized and admitted by other persons interested in the lands, it could not become barred by laches.—Vaughn v. Vaughn, Ala., 60 So. 872.

54. **Easements**—Dominent Estate.—The owner of a dominent estate held entitled to restrain the building of a curb which would prevent the use of an alley over the servient estate as a driveway.—Bowers v. Myers, Pa., 85 Atl., 860.

55. **Equity**—Creditor's Bill.—Where a bill is brought by one on behalf of himself and all other members of a benefit fund, being a class bill, the decree, if successful, will beneficially affect all of the class, although none of them have made themselves active parties.—Poole v. Supreme Circle, Brotherhood of America, N. J., 85 Atl. 821.

56.——Laches.—The mere institution of a suit does not of itself relieve a person of the charge of laches; and, if he fail in the diligent prosecution of the action, the consequences are as though no action had been begun.—Rupp v. Rogers, Md., 85 Atl. 774.

57. **Estoppel**—Feeding Title.—Where one conveys land which he does not own at the time by a deed containing the usual covenant importing an indefeasible seisin, any subsequently acquired title to such lands inured to the grantee.—Patton v. Forgey, Mo., 153 S. W. 575.

58.——Statement by Counsel.—Where plaintiff's counsel said that they would not claim a recovery on certain additional counts, and the court said he had the right to waive recovery on such counts, and defendant's counsel moved for judgment because plaintiff's waiver on the record left no answer to certain pleas, defendant could not thereafter move in arrest for misjoinder of counts, based on the fact that the counts were not formally stricken.—Lee v. Follensby, Vt., 85 Atl., 915.

59. **Executors and Administrators.**—Jurisdiction.—Direction by testator to executor to sell his real estate and distribute the proceeds does not oust jurisdiction of court to order sale to pay debts.—In re Acklin's Estate, Pa., 85 Atl. 862.

60.——Widow's Exemption.—Exemption of personalty in favor of a surviving wife is a creation of law and cannot be altered or defeated by testamentary disposition.—Richter v. Richter, Ala., 60 So. 880.

61. **Extradition**—Fugitive From Justice.—To be a fugitive from justice it is not necessary that the person charged should have left the state after indictment found, or to avoid prosecution, but simply that he committed a crime, and that, when he is sought to be subjected to criminal process, he has left the state.—Ex parte Galbreath, N. D., 139 N. W. 1050.

62. **False Imprisonment**—Mental Suffering.—One suing for false imprisonment may allege and prove mental suffering in consequence of his being prevented from rendering aid to a sick child.—Sloss-Sheffield Steel & Iron Co. v. Devaney, Ala., 60 So. 990.

63. **Fixtures**—Removability.—The casing in an oil well, and other necessary appliances and machinery for pumping a well on leased premises, are trade fixtures and removable by the owner during the term of the lease.—Robinson v. Harrison, Pa., 85 Atl. 879.

64. **Frauds, Statute of**—Oral Agreement.—An oral agreement between a mortgagee and mortgagor to extend the time of redemption, supported by no consideration except the promise of the redemption, when acted upon so that the parties cannot be placed in statu quo, is not within the statute of frauds.—Dow v. Bradbury, Me., 85 Atl. 896.

65. **Gifts**—Delivery.—To constitute a gift inter vivos, there must be an actual delivery of the gift.—Citizens' Nat Bank v. McKenna, Mo., 153 S. W. 521.

66.——Symbolical Delivery.—A symbolical delivery is sufficient only when the conditions are so adverse to actual delivery as to make a symbolical delivery as near perfect and complete as circumstances will allow.—In re Van Alstyne, N. Y., 100 N. E. 802.

67. **Homicide**—Apparent Danger.—The honest belief of the slayer at the time of the homicide that his life is in danger at the hands of decedent, must be that of a reasonable man and the belief must be an honest and reasonable one.—Underwood v. State, Ala., 60 So. 842.

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75.——Reviving Policy.—When the insurer took a premium note under the terms of which it was entitled to collect the earned premium after the policy had lapsed, the acceptance of a payment on the note, which payment was less than the earned premium, did not operate to revive the policy, or keep it alive.—Dibrell v. Citizens' Nat. Life Insurance Company, Ky., 153 S. W. 428.

76.——Visible Marks of Injury.—The "visible marks upon the body" required by a casualty insurance company need not be a bruise, contusion, laceration, or broken limb, but may be any visible evidence of internal injury or any physical effect observable from an outward indication which reveals an injured condition of the internal organs.—Royal Casualty Co. v. Nelson, Tex., 153 S. W. 674.

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89. **Parties**—Amendment.—Where the complaint alleged that plaintiff was a corporation, an amendment alleging that it was a partnership and setting out the names of the parties composing it was properly permitted.—Key v. Goodall, Brown & Co., Ala., 60 So. 986.

90. **Patents**—Contributory Infringement.—When one without a license makes and sells one element of a patented combination with the intention of bringing about its use in the combination, he is guilty of contributory infringement of the patent.—Alexander v. American Encaustic Tiling Co., N. Y., 100 N. E. 809.

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92. **Principal and Agent**—Traveling Salesman.—A traveling salesman or drummer had no authority to release a purchaser of goods from liability therefor and accept a third person in his place, and hence evidence that he did so was properly excluded.—Key v. Goodall, Brown & Co., Ala., 60 So. 986.

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Central Law Journal.

A LEGAL WEEKLY NEWSPAPER
Published by

Central Law Journal Company

420 MARKET STREET, ST. LOUIS, MO.

To whom all communications should be addressed.

Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two volumes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.

Entered at the Post-Office, St. Louis, Mo., as second-class matter.

NEEDHAM C. COLLIER, EDITOR-IN-CHIEF
ALEXANDER H. ROBBINS, MANAGING EDITOR

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